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No. 92-961

In the Supreme Court of the United States

OCTOBER TERM, 1992

MITCHELL LIPSHUTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury that convicted petitioner, a judge who accepted a payoff from a union official, was properly instructed on the elements of 18 U.S.C. 1951 where the jury was told that it could convict only if it found that petitioner accepted the cash knowing it was given with the expectation that he would extend some benefit or refrain from taking some harmful action.

2. Whether the government proved the interstate commerce element of 18 U.S.C. 1951 beyond a reasonable doubt.

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OPINION BELOW

The judgment order of the court of appeals, Pet. App. 1a-3a, is unpublished, but it is noted at 972 F.2d 1333 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1992. The petition for a writ of certiorari was filed on October 13, 1992 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of extortion under color of official right, in violation of 18 U.S.C. 1951. He was sentenced to 18 months' imprisonment. Pet. C.A. App. Da3.[1] The court of appeals affirmed. Pet. App. 1a-3a.

1. a. In 1985, the Roofers Union in Philadelphia was the subject of an investigation concerning payoffs to political officials. Through electronic surveillance of the union hall, law enforcement authorities discovered that Steven Traitz, the union's business agent, planned to continue the union's practice of giving cash at Christmas to public officials—including petitioner, then a judge of the Philadelphia Municipal Court—who could be of help to the union and its members. Gov't C.A. Br. 3; see also Pet. 9-13, 15-16.

On December 3, 1985, Traitz told a union member that he intended to give $300 to some judges and $500 to others. "In other words," he explained, "the guys that I use, I[] get 'em 500." Pet. C.A. App. Da56-Da57; see also *id.* at Da113 (Traitz remarking to union

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[1] The record on appeal in this case consisted of a videotape recording of the trial and tape recordings of conversations. Transcripts of the latter were reproduced in the appendix that petitioner filed with the court of appeals. The videotape was also transcribed, but the court of appeals required the parties to cite to the videotape, except for the small portion of the transcript reproduced in the appendix. In discussing the evidence at trial, we cite principally to petitioner's appendix and to the government's brief in the court of appeals, which in turn cites to the relevant portions of the videotape.

member on December 9, 1985, that "the Judges will take care of us. I take care of them good."). On December 5, 1985, Traitz and several union stewards stuffed envelopes with the cash intended for public officials. Gov't C.A. Br. 4, 38. Traitz mentioned that a previous business agent for the union "used to give his top judges 500." Pet. C.A. App. Da71; Pet. 15 (quoting Traitz). Traitz announced that, to "[t]he guys with balls, I'm gonna [g]ive five." *Ibid.*; Pet. 15 (quoting Traitz). Identifying petitioner as one such judge, Traitz stuffed an envelope for him with $500. *Ibid.*; see also Pet. C.A. App. Da71, Da78, Da94, Da100; Gov't C.A. Br. 4, 38.

On December 6, 1985, during a conversation about when the money would be distributed, Traitz told a union member that he would be seeing petitioner. Pet. C.A. App. Da110-Da111. Four days later, petitioner, accompanied by his girlfriend Linda Dincel, accepted the money from Traitz at the Riverfront Restaurant in Philadelphia. Gov't C.A. Br. 5; see also Pet. 16, 19. Later that day, Traitz told union members that he was not worried about a particular judge who "got scared" because "it'll go in front of one of my other friends and I'll be alright. * * * I can always go to Braig or go to [petitioner] and tell 'em 'Hey, I need help.'" Pet. C.A. App. Da118-Da119.

b. In the fall of 1985, Robert Nagel, an employee of Town and Country Roofing, approached Traitz about obtaining legal representation for Nagel's nephew, Eric Burns, who had been arrested by Philadelphia police for theft and receiving stolen property. Those offenses were misdemeanors triable in Municipal Court before petitioner. On November 27, 1985,

Burns' trial date, Traitz called petitioner and told him that Burns would be appearing before him.[2] Traitz identified Burns as "one of my guys' nephews" and said that Burns needed a "clean bill to get into the army." The case was called, but the complaining witness was unavailable due to illness. Petitioner continued the case to a special listing before himself on December 30, 1985. Gov't C.A. Br. 3, 4, 40; Pet. C.A. App. Da46-Da50; see also Pet. 13-15, 20.

On December 30, Burns appeared before petitioner for trial. Gov't C.A. Br. 5. The case was tried to the bench. *Ibid.*[3] After hearing the evidence, petitioner (who apparently had forgotten Traitz's call about the case) found Burns guilty of receiving stolen property, noting that he did not "have too much trouble" arriving at that verdict. Pet. C.A. App. Da163-Da164. Burns' attorney then asked if Robert Nagel, Burns' uncle, might speak on Burns' behalf. *Ibid.* Petitioner replied that he would hear Nagel only on the question of sentencing, explaining that "[t]he case has already been disposed of, as far as the verdict is concerned." *Id.* at Da164. After Nagel stated that Burns was planning to enlist in the armed forces, the following exchange occurred:

BY MR. PADOVA [defense counsel]:

Q. Who does [Burns] work for?

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[2] Only Traitz's end of the conversation was recorded, because the recording device was in the union hall's ceiling. Gov't C.A. Br. 4.

[3] The transcript of the Burns trial, Pet. C.A. App. Da129-Da170, was admitted into evidence at petitioner's trial. Gov't C.A. Br. 40.

> A. He works for the Roofer's Union, and he works for me. I am in the Roofer's Union.
>
> THE COURT [petitioner]:
>
> It just seems a shame if he wants to go into the Air Force—
>
> MR. NAGEL:
>
> I have been suggesting the Navy, Your Honor.
>
> THE COURT:
>
> Let me see counsel in the back.

Id. at Da165-Da166.

Petitioner then conducted an off-the-record discussion in which he berated defense counsel for not calling Nagel as a character witness and told the assistant district attorney that the case would be reversed on appeal. Pet. C.A. App. Da166; Gov't C.A. Br. 8. Petitioner set aside the conviction, granted a new trial, incorporated the record from the previous trial, and accepted a stipulation as to what Nagel's testimony would be. Petitioner then acquitted Burns. Pet. C.A. App. Da166-Da169; Gov't C.A. Br. 8.

c. On February 10, 1986, two FBI agents interviewed petitioner at his home. When asked if Traitz had given him an envelope containing $500 at the Riverfront Restaurant on December 10, 1985, petitioner replied that he would have to "cudgel" his memory. When asked if Traitz had ever asked him to

intercede in a case, petitioner said that he could not recall. Gov't C.A. Br. 8-9, 40; Pet. 26-27.[4]

d. On April 29, 1986, one day before the filing deadline, petitioner filed a financial disclosure form with the Pennsylvania Supreme Court listing a $500 personal gift from Traitz. Gov't C.A. Br. 9; Pet. 39.

2. Petitioner testified in his own defense. He admitted that Traitz gave him $500 in the Riverfront Restaurant on December 10, 1985, but he claimed that he and Traitz were longtime friends and that the money was a wedding gift. He denied that he had set aside Burns' conviction as a result of his telephone conversation with Traitz about the case. Gov't C.A. Br. 9, 26-27; Pet. 4-5.

At the close of the evidence, petitioner moved for a judgment of acquittal, relying on *McCormick* v. *United States*, 111 S. Ct. 1807 (1991), to support his claim that "the mere receipt of money in itself is ambiguous." July 17, 1991, Tr. 172. The court denied the motion. It noted that, unlike this case, *McCormick* involved a payment that was alleged to be a campaign contribution. The court explained that it could see "the great danger to anybody holding public office of confusing their responding to a constituent's needs and having also received a campaign contribution from that constituent." *Id.* at 173. "But," the court continued, "what is a judge allowed to do for a constituent? Nothing." *Ibid.*

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[4] Linda Dincel, who had been present at the restaurant when petitioner received the $500, was also present during much of petitioner's interview with the FBI agent, but made no comment. She married petitioner 12 days later. Gov't C.A. Br. 9.

Prior to instructing the jury, the district court described the instructions it planned to give. With respect to the elements of extortion under color of official right, the court said, among other things, that it intended to instruct the jury that "[i]t is enough that the benefactor transfers something of significant value to the public official, with the expectation that the public official will extend to him some benefit or refrain from some harmful action. And the public official accepts the thing of significant value, knowing that it is being transferred to him because of his office." July 19, 1991, Tr. 148. Defense counsel responded: "I take it then, you're rejecting the Defendant's point for charge that was submitted this day to the Court?" *Id.* at 149. The court said "yes." Defense counsel then turned to what he referred to as a question "of particular concern, * * * the admissibility of the tapes." *Ibid.*[5]

The district court instructed the jury as follows:

> Extortion under color of official right is the wrongful taking or accepting by a public official of money or other property not due him or his office. It is enough that the benefactor transfers something of significant value to the public official with the expectation that the

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[5] While arguing that petitioner sought an instruction that "required proof of a *quid pro quo*," Pet. 5, petitioner has not reproduced the instruction that was requested, and we have not been able to locate such a requested instruction, either in the record or elsewhere. (Government trial counsel's recollection is that defense counsel gave the district court a handwritten proposed instruction shortly before the court described the instructions it planned to give.)

public official will extend to him some benefit or refrain from some harmful action. And the public official accepts the thing of significant value * * * that is being transferred to him because of his office.

All that is necessary is that the motivation for the payment or giving of property, be the public official's office to which the defendant was not entitled. In short, the benefits must have been given to the defendant because of his public office and the defendant must have accepted the benefit knowing the motive.

There's no requirement that the public official induced the payment, or giving of other property in the sense that he demanded it, initiated it, suggested it or solicited it. The public office itself provides the inducement for the giving of the property.

The Government need not prove as part of its case that the public official misused his office in a sense that he granted some benefit or advantage to his benefactor to which the benefactor was not entitled.

A public official misuses his office when he passively receives and retains property because of his office. In short, the Government need not show that the defendant did anything for the person or entity which gave him property or even promised to do so. A public official's retention of things of value paid to him by private persons for performance of official duty is a misuse of his office in and of

> itself. This is true, even if the public official accepts property for an implicit promise of fair treatment.
>
> It is not necessary to prove that the defendant obtained or accepted money or property through the use of coercion, duress or fear toward the payor.

Pet. C.A. App. Da174-Da175. See also *id.* at Da173 (government must prove beyond a reasonable doubt that "the money was given to the defendant due to his official position, that is, because he was a judge," and that "the defendant accepted the money knowing that it was being given to him because of his official position"), Da175-Da176 (same), Da177-Da178 (same).

4. The court of appeals affirmed by judgment order. Pet. App. 1a-3a. The court stated that it had considered petitioner's contention that "the district court erred in ruling that the Hobbs Act does not require proof of a *quid pro quo* in the context of alleged under color of official right offenses," as well as his claim that the case "must be remanded for a hearing as to whether the money paid to [petitioner] by Traitz was derived from a fund properly classified as an asset of the Roofer's Union[.]" Pet. App. 2a.[6]

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[6] The court likewise rejected petitioner's contentions that the government had not "adduced sufficient evidence of [his] knowledge that the money was provided to him because of his office," Pet. App. 2a; that some of the district court's evidentiary rulings "violated [his] rights to confrontation and a fair trial," Pet. App. 1a-2a; and that his prosecution in federal court violated the Double Jeopardy Clause and his right to a speedy trial, Pet. App. 2a. Although petitioner mentions the last of

ARGUMENT

1. Petitioner first contends, Pet. 40-63, that the district court should have instructed the jury that it could not convict him unless the government proved that he agreed to commit a specific act in return for the payoff. There is no merit to that contention.

In *McCormick* v. *United States*, *supra*, which involved the receipt of campaign contributions, this Court held that "[t]he receipt of contributions is * * * vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 111 S. Ct. at 1816. The Court reasoned that "[t]o hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *Ibid.* In *Evans* v. *United States*, 112 S. Ct. 1881 (1992), in contrast, which involved the receipt of a $7,000 payment that was not a campaign contribution, the Court held "that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 112 S. Ct. at 1889.[7]

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those contentions in his statement of the case, Pet. 6-9, he has not otherwise pursued any of them in this Court.

[7] The difference is in the specificity of the agreement. That is, it would not be a violation of the Hobbs Act to make a campaign contribution to a legislator because the legislator was

In this case, petitioner did not claim that the $500 was a campaign contribution. Instead, he claimed that Traitz gave him the $500 as an early wedding gift. Pet. 5. It is clear that the jury did not believe petitioner, but instead accepted the evidence adduced by the government that the $500 was paid for access, influence, and favorable treatment in cases involving union members. That evidence included the recorded conversations between Traitz and union members about how petitioner "comes through" for them, Traitz's telephone call to petitioner asking him to give the nephew of a union member a "clean bill" in a case about to come before him, and petitioner's setting aside of his own verdict in that case after the union member reminded him, at sentencing, of the union connection. In other words, petitioner was placed "on retainer" by the annual payment. And the evidence showed that he "came through," even though the jury was instructed that the government did not need to prove that petitioner had actually misused his office.

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generally in favor of protectionist trade policy and the contributor's business would profit from protectionist legislation. But it would be a violation of the Hobbs Act, under *McCormick*, for a candidate to accept a campaign contribution that was expressly conditioned on the candidate's agreement to vote in a particular manner on a specific matter. It would also be a violation of the Hobbs Act, under *Evans*, for a legislator to accept a cash payoff (not a campaign contribution) from a person the legislator knows to have an interest in protectionist legislation, where the legislator knows that the payment was made in return for the legislator's official acts of support for protectionist trade policies, even if no specific act was promised in exchange for the payment.

The jury instructions that were given in this case were consistent with *Evans*. The jury was instructed that, in order to convict, it had to find that "the benefactor transfers something of significant value to the public official with the expectation that the public official will extend to him some benefit or refrain from some harmful action," and that "the public official accepts the thing of significant value knowing that it is being transferred to him because of his office." Pet. C.A. App. Da174. That was sufficient to satisfy *Evans*, for it shows that the jury found that petitioner believed the payment was made "in return for official acts." 112 S. Ct. at 1889.[8]

2. Petitioner also contends, Pet. 63-64, that the government failed to prove the interstate commerce element of 18 U.S.C. 1951 beyond a reasonable doubt.[9]

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[8] Petitioner states, Pet. 52, that in *McCormick*, 111 S. Ct. at 1813 n.5, this Court "recognized that a conflict exists in the Circuits respecting the applicability of the *quid pro quo* requirement to non-campaign funds." In fact, in the footnote cited by petitioner, the Court recognized that there was an inter-circuit conflict on the question whether an affirmative act of inducement by a public official was an element of the offense of extortion under color of official right. The Court observed that resolution of that conflict would have to await another day. 111 S. Ct. at 1813 n.5. That day came in *Evans* v. *United States*, *supra*, and the Court held that inducement is not required.

[9] Section 1951(a) prohibits obstructing, delaying, or affecting commerce "in any way or degree." Section 1951(b)(3) defines "commerce," in pertinent part, as "all commerce between any point in a State * * * and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

On appeal, petitioner raised a claim that he conceded (Pet. C.A. Br. 47) he had not presented to the district court. He requested a remand to determine if the union's legal services fund was an asset of the union or a trust fund that belonged to eligible members of the union as opposed to the union as an entity. Pet. C.A. Br. 47-48. The court of appeals denied the request for a remand without discussion. Pet. App. 2a.

In this Court, petitioner asks for more. He argues that the legal services fund "is not an asset of the union," that "the United States has failed to prove the necessary jurisdictional element of the offense," and that "[a]n error in recognition of this factor would constitute plain error." Pet. 64. Review of that contention is not warranted, if only for the reason that it was neither raised in the court of appeals nor addressed by that court. See, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984).

In any event, there is no merit to petitioner's contention. The evidence showed that the Roofers Union locals for which Traitz served as the business agent included within their jurisdiction the States of New Jersey, Pennsylvania, and Delaware, and that union members performed work for contractors in all three States. Gov't C.A. Br. 35, 37. The evidence also showed that the $500 paid to petitioner came from two sources: (1) kickbacks paid to Traitz by a law firm that represented union members under a prepaid legal services plan, which was funded by the union-affiliated contractors and which operated on behalf of union members from all three States, and (2) checks

drawn on the union's account at Continental Bank and payable to union stewards, ostensibly to reimburse them for travel and telephone expenses, but which were in fact cashed by Traitz's secretary and given to Traitz. Gov't C.A. Br. 4-5, 35, 37-38; see also Pet. 12 & n.3, and Pet. C.A. App. Da42-Da43, Da58-Da61, Da84.

The district court instructed the jury that in order to convict petitioner, it had to find beyond a reasonable doubt that because of the $500 payment to him, "interstate commerce was delayed, interrupted or adversely affected." Pet. C.A. App. Da176. The court explained that "interstate commerce may be adversely affected within the meaning of these instructions by an increase in the cost of doing business in interstate commerce, or by the reduction of profits from interstate business." *Ibid.* It concluded by stating that "[i]f you find beyond a reasonable doubt that the roofers union had jurisdiction over Pennsylvania, New Jersey and Delaware, and its assets were depleted by a $500 payment to the defendant * * * then the interstate commerce element has been satisfied." *Id.* at Da177.[10]

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[10] After the court instructed the jury, petitioner's attorney asked the court "to instruct the jury that in the event that they find that the money that was used by Steven Traitz in this case came from Herbert Fisher, that they may not consider that money was derived in any way from a source which would affect interstate commerce." Pet. C.A. App. Da187. (Fisher was a member of the law firm—Bloom, Ocks and Fisher—that represented union members under the union's prepaid legal fund and that kicked back ten per cent of its fees in cash to union officials, who then distributed the money to public officials helpful to the union. Gov't C.A. Br. 38.) Petitioner himself then expanded on this request, arguing that "if the

The instructions accurately defined the interstate commerce element for the jury. See *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); see also *United States* v. *McKenna*, 889 F.2d 1168, 1173 (1st Cir. 1989); *United States* v. *Murphy*, 768 F.2d 1518, 1530-1531 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); *United States* v. *Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980). A reasonable jury could find that the $500 payment to petitioner affected commerce within the meaning of the Hobbs Act by depleting or diminishing assets of the union, which operated in and derived its money from three States. Accordingly, the interstate commerce element of the statute was satisfied.

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money had—once it reached Mr. Fisher was his and he illegally gave it, then the union wasn't entitled to it and therefore it was not a proper asset of the union and therefore the proper assets were not depleted. It's not a proper asset if somebody steals money." Pet. C.A. App. Da187. In other words, petitioner contended that if the payoff he obtained had been received by the union as a kickback, he was absolved of liability. The court properly denied the requested instruction, *ibid.*, as there is no legal basis for petitioner's contention that extortion cannot affect interstate commerce if the funds paid to the defendant were unlawfully obtained by the victim in the first place.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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